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No.

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

SDDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR CERTIORARI

MICHAEL J. SCHAFFER
SANDRA K. HOGLAND
Davenport, Evans, Hurwitz & Smith, LLP
513 South Main Avenue
Sioux Falls, SD 57101
(605) 336-2880

CHARLES A. ROTHFELD
Counsel of Record
DAVID GOSSETT
Mayer, Brown & Platt
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM P. FULLER
Woods, Fuller, Shultz & Smith, P.C.
300 S. Philips Ave., Ste. 300
P.O. Box 5027
Sioux Falls, SD 57101
(605) 336-3890

Counsel for Petitioner

85pp

QUESTIONS PRESENTED

In this case, a federal court issued an injunction to prevent the State of South Dakota from defending itself against certain claims in a takings action for money damages brought against the State in its own state courts. The State then moved, pursuant to Fed. R. Civ. P. 60(b)(4), to vacate the federal court's injunction and a prior judgment in the same case as void because the State had never consented to suit in federal court, and because state law barred state officials from waiving Eleventh Amendment immunity from suit in federal court. This motion was denied and the denial was affirmed by the court of appeals, which held that the State had waived its Eleventh Amendment immunity by litigating the case on the merits. The questions presented are:

1. Whether a State should be deemed to have waived its Eleventh Amendment immunity by litigating the merits of the claim against it in federal court, even when state law prohibits state officials from waiving that immunity.

2. Whether a party is barred from seeking relief from a void judgment under Rule 60(b)(4) because the party did not seek to challenge that judgment by petitioning for a writ of certiorari in this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (I)

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND RULE INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

A. The Eighth Circuit's Holding That A State Waives Its Eleventh Immunity By Engaging In Litigation Is Inconsistent With Decisions Of This Court And Of Other Courts Of Appeals 8

B. The Eighth Circuit's Holding That A Party May Not Seek To Vacate A Void Judgment Under Rule 60(b)(4) Without First Having Appealed And Sought Certiorari Exacerbates A Conflict In The Circuits And Departs From Decisions Of This Court 20

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page**

Alabama v. *Pugh*, 438 U.S. 781 (1978) 9, 18

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 2, 12, 14

Atlantic Healthcare Benefits Trust v. *Googins*, 2 F.3d 1 (2d Cir. 1993) 15

Beers v. *Arkansas*, 61 U.S. (20 How.) 527 (1858) 11

Benning v. *Board of Regents*, 928 F.2d 775 (7th Cir. 1991) 15

Calderon v. *Ashmus*, 523 U.S. 740 (1998) 9

Carter v. *Fenner*, 136 F.3d 1000 (5th Cir. 1998) 22

College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 12, 13

Cory v. *White*, 457 U.S. 85 (1982) 17

Edelman v. *Jordan*, 415 U.S. 651 (1974) 9, 14, 15, 19

Estate of Ritter v. *University of Mich.*, 851 F.2d 846 (6th Cir. 1988) 15

Ex parte New York, 256 U.S. 490, 497 (1921) 12

Ex parte Young, 209 U.S. 123 (1908) 17, 18

TABLE OF AUTHORITIES — Continued

Page

Florida Dep't of State v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982) 9, 18

Ford Motor Co. v. *Department of Treasury*, 323 U.S. 459 (1945) ..... *passim*

Freimanis v. *Sea-Land Serv., Inc.*, 654 F.2d 1155 (5th Cir. 1981) 14

Garcia v. *Board of Educ.*, 777 F.2d 1403 (10th Cir. 1985) 14, 15

Genentech, Inc. v. *Regents of Univ. of Cal.*, 143 F.3d 1446 (Fed. Cir. 1998), cert. granted, judgment vacated by 527 U.S. 1031 (1999) 16

In re Gledhill, 76 F.3d 1070 (10th Cir. 1996) 23

Green v. *Mansour*, 474 U.S. 64 (1985) 8, 17, 19, 20

Hankins v. *Finnel*, 964 F.2d 853 (8th Cir. 1992) 6, 13

Hess v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) 17

Hill v. *Blind Ind. & Servs.*, 179 F.3d 754 (1999), amended by 201 F.3d 1186 (9th Cir. 2000) 15, 16

Idaho v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997) 7, 8, 18

Jordan v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) 21, 22, 23

TABLE OF AUTHORITIES — Continued

Page

Katz v. *Regents of Univ. of Cal.*, 229 F.3d 831 (9th Cir. 2000) 16

Linkenhoker v. *Weinberger*, 529 F.2d 51 (4th Cir. 1975) 15

MCI Telecomm. Corp. v. *Public Serv. Comm'n*, 210 F.3d 929 (10th Cir.), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) 16

Mascheroni v. *Board of Regents*, 28 F.3d 1554 (10th Cir. 1994) 14

Morris v. *Washington Metro. Area Transit Auth.*, 702 F.2d 1037 (D.C. Cir. 1983) 15

Papasan v. *Allain*, 478 U.S. 265 (1986) 19

Parden v. *Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964) 13

Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 12, 14, 17

Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 17

Richardson v. *New York State Dep't of Correctional Serv.*, 180 F.3d 426 (2d Cir. 1999) 14

In re SDDS, Inc., 97 F.3d 1030 (9th Cir. 1996) ..... *passim*

SDDS, Inc. v. *State*, 569 N.W.2d 289 (S.D. 1997) .. 3, 5, 20

TABLE OF AUTHORITIES — Continued

Page

SDDS, Inc. v. *State*, 47 F.3d 263 (8th Cir. 1995) .... *passim*

Saahir v. *Estelle*, 47 F.3d 758 (5th Cir. 1995) 14

Seminole Tribe v. *Florida*,
517 U.S. 44 (1996) 17

Sindia Expedition, Inc. v. *Wrecked & Abandoned Vessel*,
895 F.2d 116 (3d Cir. 1990) 15

Sosna v. *Iowa*, 419 U.S. 393 (1975) 9, 10

South Dakota v. *SDDS, Inc.*, 523 U.S. 118 (1998) 5

Tindal v. *Wesley*, 167 U.S. 204 (1897) 18

United States v. *United States Fid. & Guar. Co.*,
309 U.S. 506 (1940) 24, 25

Vecchione v. *Wohlgemuth*, 558 F.2d 150
(3d Cir. 1977) 22, 23

Watts v. *Pinckney*, 752 F.2d 406 (9th Cir. 1985) 22, 23

Whiting v. *Jackson State Univ.*, 616 F.2d 116
(5th Cir. 1980) 15

Wisconsin Dep't of Corrections v. *Schacht*,
524 U.S. 381 (1998) 9, 11, 16

TABLE OF AUTHORITIES — Continued

Page

Constitution, Statutes, and Regulations:

U.S. Const. Amend. XI ..... *passim*

28 U.S.C. § 1254 1

28 U.S.C. § 1257 5

Fed. R. Civ. P. 60 ..... *passim*

S.D. Codified Laws § 3-21-10 (Michie 2000) 11

Miscellaneous:

12 Daniel R. Coquillette et al., MOORE'S FEDERAL PRACTICE (Matthew Bender ed. 1999). 24

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App., *infra*, 1a-6a) is reported at 225 F.3d 970. The order of the United States District Court for the District of South Dakota (App., *infra*, 7a-8a) is unreported.

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit was filed on September 15, 2000, and a timely petition for rehearing was denied on November 9, 2000. App., *infra*, 50a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI.

Federal Rule of Civil Procedure 60(b) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void." Fed. R. Civ. P. 60(b)(4).

STATEMENT

The decision below is the last in a series of Eighth Circuit holdings in this litigation that have worked an extraordinary departure from the principles of the Eleventh Amendment. In its prior decisions at earlier stages of this proceeding, the court of appeals entertained an action brought *directly* against the State of South Dakota in its own name and then enjoined the State and state officials not to defend South Dakota against claims for money damages advanced in the State's own courts, effectively directing the entry of judgment against the State in a suit for retroactive monetary relief. In the decision below, the court held that those earlier judgments could not be set aside as void under the Eleventh Amendment because the State had surrendered its Eleventh Amendment immunity simply by litigating the merits of the claims against it – notwithstanding a South Dakota statute that expressly prohibits state officials from waiving the State's immunity. The Eighth Circuit also held that a party may not seek to set aside a judgment as void under Fed. R. Civ. P. 60(b)(4) unless it first not only takes an appeal from the challenged judgment, but also seeks review of that judgment by writ of certiorari in this Court. Both aspects of that holding are inconsistent with this Court's decisions and irreconcilable with the rulings of other courts of appeals. Because the decision below made those errors in a setting that "implicates the fundamental constitutional balance between the Federal Government and the States" (*Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 (1985)), review by this Court is imperative.

1. The procedural history of this case is long and complex, but the relevant developments are (relatively) simply stated. In 1991, the citizens of South Dakota enacted a ballot referendum that South Dakota Disposal Systems, Inc. ("SDDS"), respondent in this Court, alleged prevented it from operating a waste disposal facility in that State. SDDS responded by

bringing an action in federal court seeking declaratory and injunctive relief against both the State of South Dakota itself and various state officials, arguing that the referendum violated the Commerce Clause of the U.S. Constitution. The Eighth Circuit agreed with respondent's claim, holding the referendum unconstitutional. *SDDS, Inc.* v. *State*, 47 F.3d 263, 268 (8th Cir. 1995) ("*SDDS VI*") (App., *infra*, 32a-49a).[1]

At the same time that SDDS pursued relief in federal court, it also commenced a temporary takings action against the State in South Dakota state court, seeking millions of dollars for losses allegedly resulting from the referendum. See *SDDS, Inc.* v. *State*, 569 N.W.2d 289, 290 (S.D. 1997) ("*SDDS* v. *State*"). SDDS alleged that the taking ran from July 1, 1991, the date approval of the facility allegedly would have gone into effect absent the referendum, to February 6, 1995, the date on which the Eighth Circuit held the referendum unconstitutional. The trial court granted summary judgment to the State on this claim because SDDS was not entitled to site, construct or operate a waste disposal facility without a valid permit; because SDDS never held a valid permit; and because SDDS failed to demonstrate that the referendum was the cause of the facility's failure. See *ibid.* SDDS appealed that decision to the South Dakota Supreme Court.

While that state-court appeal was pending, SDDS also sought an injunction from the *federal court* that would bar the State and state officials from defending the ruling of the state trial court in the state-court litigation. The district court denied injunctive relief, but the Eighth Circuit reversed. *In re SDDS, Inc.*, 97 F.3d 1030 (9th Cir. 1996) ("*SDDS VIII*") (App., *infra*, 9a-31a). The court of appeals began by holding that the Eleventh Amendment did not deprive it of jurisdiction,

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[1] We cite to the Eighth Circuit's prior decisions as *SDDS VI* and *SDDS VIII* to conform to the citation style used in the decision below.

reasoning that – although the State was named as a party – the court could entertain the suit because the action sought "only to effectuate our earlier judgment" in *SDDS VI*. 97 F.3d at 1033-1036 & n.7 (App., *infra*, 10a-18a & n.7). The court of appeals reached this conclusion even though there no longer was any continuing violation of federal law because the referendum had long ago been declared unconstitutional and SDDS had abandoned its plans to construct a waste disposal facility; respondent's sole purpose in seeking the *SDDS VIII* injunction was to direct the outcome of litigation against the State seeking *retroactive* money damages for a *past* (and already terminated) temporary taking. Turning to the merits, the Eighth Circuit, relying on two rather opaque footnotes in its prior Commerce Clause opinion, went on to determine that *SDDS VI* had in fact resolved in SDDS's favor two of the principal issues in the pending state takings suit. See 97 F.3d at 1037-1040 (App., *infra*, 20a-28a). The Eighth Circuit accordingly directed the district court to enjoin "the Defendants from relitigating in the South Dakota state courts the issues of (1) whether [respondent] had a legitimate claim of entitlement to a permit to operate a [waste disposal facility], and (2) whether the referendum was the proximate cause of [respondent's] dissolution." *Id.* at 1042 (App., *infra*, 31a).

Armed with the federal injunction, SDDS then prevented the State from presenting argument to the South Dakota Supreme Court in the state takings case, threatening the State with federal contempt proceedings and demanding that the State withdraw the brief it had submitted to that court. Under threat of federal contempt proceedings, the State declined to file a supplemental brief requested by the South Dakota Supreme Court or to present any oral argument regarding the impact of the federal injunction upon the state takings action. The South Dakota Supreme Court therefore considered the takings case without hearing argument from the State.

That court proceeded to rule for SDDS on the merits of the takings claim, reversing the trial court's grant of summary judgment for the State and remanding the case for a calculation of respondent's damages. *SDDS* v. *State*, *supra*. The South Dakota Supreme Court explicitly stated that it believed itself bound to rule for SDDS by the Eighth Circuit's decision, declaring that, had it been able to reach the merits of the takings claim, the "analysis of [its] own case law may have produced a different result." 569 N.W.2d at 293 & n.9. The South Dakota Supreme Court thus noted that, under South Dakota law, SDDS did not have a vested property interest that would be compensable in a takings suit. *Id.* at 293 n.9. As a consequence, but for the federal injunction, the South Dakota Supreme Court likely would have affirmed the grant of summary judgment to the State in the takings action. The State unsuccessfully petitioned this Court for a writ of certiorari to review the South Dakota Supreme Court's decision. *South Dakota* v. *SDDS, Inc.*, 523 U.S. 118 (1998)).[2]

Upon remand of the taking action, the South Dakota trial court entered a judgment in excess of $10 million against the State. That judgment subsequently was vacated by an order for a new trial, which is itself currently on appeal to the South Dakota Supreme Court.

2. Shortly after the South Dakota Supreme Court's decision, the State and various state officials moved the federal district court under Fed. R. Civ. P. 60(b)(4) to set aside as void the federal judgments resulting from the decisions in *SDDS VI*

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[2] SDDS resisted that petition by arguing, among other things, that the state court judgment was not a final ruling within the meaning of 28 U.S.C. § 1257. That argument, of course, has no bearing on this petition. In addition, SDDS argued that the State was indirectly attacking the federal court ruling, a contention that also is no longer relevant in this phase of the case.

and *SDDS VIII* – that is, the judgments that the South Dakota Supreme Court regarded as dictating a ruling in SDDS's favor in the takings claim. The state movants argued that the Eleventh Amendment precluded federal courts from asserting jurisdiction directly over the State of South Dakota or from issuing injunctive relief that effectively imposed monetary liability on the State. The district court denied the motion. App., *infra*, 7a-8a.

The court of appeals affirmed, on two related grounds. App., *infra*, 1a-6a. First, the court held that the State was not entitled to Rule 60(b)(4) relief because it

> did not seek review, by petition for writ of certiorari, of either *SDDS VI* or *SDDS VIII* and instead has attempted to collaterally attack those final decisions by way of a Rule 60(b) motion in the district court. Just as a rule 60(b) motion cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal, not can it be used to collaterally attack a final court of appeals' ruling in lieu of a proper petition for certiorari in the United States Supreme Court.

Id. at 4a.

Second, the Eighth Circuit held that the State had waived its Eleventh Amendment immunity by defending the *SDDS VI* and *SDDS VIII* suits on the merits in federal court. The court of appeals was of the view that "'[a] state may * * * waive its Eleventh Amendment immunity through its conduct. Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits.'" App., *infra*, 4a (quoting *Hankins* v. *Finnel*, 964 F.2d 853, 856 (8th Cir. 1992)). From that starting point, the court held:

> In the present case, the State for many years actively and vigorously litigated the merits of SDDS's claims in federal court, never once raising an Eleventh Amendment immunity defense until after the mandates had been issued and our decisions in *SDDS VI* and *SDDS VIII* were final. In light of the State's conduct, it would appear that the State has waived any sovereign immunity defense it may have had to the claims addressed in *SDDS VI* and *SDDS VIII*.

Id. at 4a-5a.[3]

REASONS FOR GRANTING THE PETITION

Although the Eighth Circuit's decision is brief, the court committed significant errors of law that will undermine fundamental Eleventh Amendment doctrine, detract from "the dignity and respect afforded a State, which the [Eleventh Amendment] immunity is designed to protect" (*Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997)), and create uncertainty in areas of great practical importance. The court of appeals' conclusion that a State's conduct of litigation will effect a waiver of Eleventh Amendment immunity means that

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[3] Although it should be irrelevant to Eleventh Amendment analysis whether the State raised its immunity at some earlier point in the litigation, and the whether the State did so therefore does not bear on the proper answer to the questions presented in the petition, it is worth noting that the State in fact *did* raise its Eleventh Amendment immunity in *SDDS VIII*. The court of appeals could hardly have been unaware of that: the court itself addressed the State's Eleventh Amendment arguments at some length in its opinion in that case. See 97 F.3d at 1033-1036 & n.7 (App., *infra*, 15a-19a & n.7). The State also raised the Eleventh Amendment in its answer to the *SDDS* complaint, advancing as an affirmative defense "that Plaintiff's claim fails on the doctrine of sovereign immunity and, to the extent that it can be construed to involve a claim for monetary relief, is barred by the Eleventh Amendment to the United States Constitution." Answer at 17, ¶ 24.

States will be held liable in federal court even when they did not voluntarily submit themselves to federal-court jurisdiction. And the Eighth Circuit's analysis of Rule 60(b)(4) would, among other things, make the filing of a petition for certiorari in *this Court* (whether or not the case is certworthy) a prerequisite for obtaining relief from a void judgment under Fed. R. Civ. P. 60(b). Not surprisingly, both aspects of this decision are insupportable and inconsistent with the holdings of other courts of appeals.

A. The Eighth Circuit's Holding That A State Waives Its Eleventh Immunity By Engaging In Litigation Is Inconsistent With Decisions Of This Court And Of Other Courts Of Appeals

In holding that its prior judgment should not be vacated as void for lack of jurisdiction, the court of appeals reasoned that South Dakota should be deemed to have waived its Eleventh Amendment immunity because the State had "for many years actively and vigorously litigated the merits of [respondent's] claims in federal court." App., *infra*, 6a. This holding, however, plainly cannot be reconciled either with decisions of this Court or with the rulings of other courts of appeals. The Eighth Circuit's decision also contributes to continuing confusion in the lower courts about the scope of Eleventh Amendment doctrine. And it opens the door to a kind of "'end run'" around the fundamental requirement that state consent to federal-court jurisdiction be truly voluntary. *Green* v. *Mansour*, 474 U.S. 64, 73 (1985). For these reasons, review of the decision below is warranted.

1. The court of appeals surely was correct in noting that States are free to waive their Eleventh Amendment immunity. See, *e.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 267. But that court was just as plainly incorrect in holding that a State's "conduct" in litigating a case on the merits may be deemed to effect such

a waiver. App., *infra*, 6a-7a. This Court has held consistently and repeatedly that "[t]he fact that the State appeared and offered defenses on the merits does *not* foreclose consideration of the Eleventh Amendment issue; 'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar' *that it may be raised at any point of the proceedings.*" *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982) (plurality opinion) (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974)) (emphasis added). See *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings"); *Alabama* v. *Pugh*, 438 U.S. 781, 782 n.1 (1978) ("'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court'") (quoting *Edelman*); *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975) ("[T]he failure of the State to raise the defense of sovereign immunity in the District Court would not have barred [the State] from raising that issue in this Court"). See also *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) ("The Court has said that the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits.").

The Court's leading decision on this point is *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), which applied the controlling principle in circumstances virtually identical to those here. In *Ford Motor*, attorneys for Indiana "appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits," failing to raise the Eleventh Amendment until the case reached this Court. *Id.* at 466-467. The Court nevertheless held that

> [t]his was in time [to raise the defense], however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

Id. at 467.

Of particular relevance here, the Court went on to note that "[i]t is conceded by the [State] that if it is within the power of the administrative and executive officers of [the State] to waive the state's immunity, they have done so in this proceeding. *The issue thus becomes one of their power under state law to do so.*" *Ibid.* (emphasis added). The Court accordingly held that it is necessary in such circumstances to examine the State's constitutional and statutory law to determine whether the State's attorneys were authorized to waive the State's Eleventh Amendment immunity in the course of litigation. Finding nothing in state law that conferred such power on state officials – notwithstanding the vigorous defense on the merits offered by the State's attorneys in the trial and appellate courts – the Court concluded in *Ford Motor* that "no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts." *Id.* at 469. The Court therefore ordered the case dismissed "for want of consent by the state to this suit." *Id.* at 470.[4]

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[4] The Court took the same approach in *Sosna* v. *Iowa*, 419 U.S. 393 (1975). In that case, Iowa advanced the Eleventh Amendment in the answer to the complaint, but then "abandoned" the Eleventh Amendment defense and did not advance it when the case reached this Court. *Id.* at 396 n.2. The Court nevertheless found it necessary to itself examine state law to determine "the circumstances under which Iowa law permits waiver of the defense of sovereign immunity by attorneys representing the State." *Ibid.*

The decision below cannot be reconciled with the rule applied by *Ford Motor* and restated in the Court's subsequent Eleventh Amendment decisions. *Ford Motor* establishes that, at a minimum, a federal court may not deem a State's participation in federal-court litigation to abrogate the State's immunity unless the court first determines that such a waiver is expressly contemplated by state law.[5] Here, however, the Eighth Circuit declined to make *any* inquiry into whether South Dakota law authorized waiver of the State's Eleventh Amendment immunity, finding instead that "the State's conduct" was sufficient to "waive[] any sovereign immunity defense it may have had." App., *infra*, 4a-5a. Yet had the court of appeals asked the question required by *Ford Motor*, it would have found that, far from authorizing the waiver of its immunity, South Dakota law expressly *prohibits* state officials from making such a waiver: "No waiver of state immunity by statute or, where permitted, by any officer or agent of the state may constitute or be interpreted as a waiver of the state's immunity from lawsuits in federal court." S.D. CODIFIED LAWS § 3-21-10 (Michie 2000).[6] Indeed, the South Dakota statute is,

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[5] In fact, a State may withdraw its consent to suit even *after* an action has been initiated. See *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). There is some authority for the proposition that immunity is waived when "a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction." *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring). But see *id.* at 392 ((opinion of the Court) ("A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim"). Even if that rule is correct, however, it has no bearing here: South Dakota did nothing to invoke the jurisdiction of the federal courts.

[6] The court of appeals' disregard of this statute was not an oversight: the South Dakota law was expressly called to the court's attention in the State's reply brief, see *In re SDDS, Inc.*, Nos. 98-3588, 99-1034,

if anything, more unambiguous on this point than the law that the Court in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984), read as stating "an express preservation of [the State's] immunity from suit in federal court." See also *Ford Motor*, 323 U.S. at 467-468. The Eighth Circuit's error thus had – and, if repeated by other courts, often will have – very significant practical consequences.

Perhaps more fundamentally, that error also threatens values that are central to principles underlying the Eleventh Amendment. "'That a State may not be sued without its consent is a fundamental rule of jurisprudence'" stemming "from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst*, 465 U.S. at 98, 99 (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)). The Court has effectuated this understanding by requiring "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero*, 473 U.S. at 238 n.1. As a consequence, the Court has insisted repeatedly, in a wide range of contexts, that the "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Atascadero*, 473 U.S. at 241). Against this background, "[t]he whole point of requiring a 'clear declaration' by the State of its waiver is to be certain that the State in fact consents to suit" and that "the State made an 'altogether voluntary' decision to waive its immunity." 527 U.S. at 680, 681 (citation omitted). The Eighth Circuit's approach, however, makes that certainty impossible – and

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99-1035 (8th Cir.), State's Reply. Br. 17-18, and at oral argument. The Eighth Circuit thus plainly was of the view that state statutory law cannot preclude waiver of immunity by conduct.

threatens to undermine the stringency of the test applied in widely disparate Eleventh Amendment settings.[7]

Indeed, the Court has recently demonstrated that the doctrine of implied waiver has no place at all in Eleventh Amendment jurisprudence. *College Sav. Bank*, 527 U.S. at 675-687. In overruling *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), the Court held that *Parden*'s constructive-waiver approach is inconsistent with the requirement that a State's waiver of sovereign immunity be "unequivocal." *College Sav. Bank*, 527 U.S. at 680. *College Savings Bank* also recognized that "[t]he classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right

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[7] The Eighth Circuit's assertion that the State did not raise the Eleventh Amendment until "after the mandates had been issued" in *SDDS VI* and *SDDS VIII* does not affect the scope of its holding or bear on the nature of the issues presented here, for several reasons. *First*, the court plainly did not mean to suggest that, under its approach, waiver occurs only when the State waits until after final judgment to raise the immunity defense; the principal authority upon which the court relied for its waiver theory was a prior Eighth Circuit decision finding waiver where the State asserted immunity during the course of the initial district court proceedings (although the Eighth Circuit in that case found that the State had affirmatively sought to take advantage of the federal litigation for its own benefit, a factor that is not present here). App., *infra*, 4a (citing *Hankins* v. *Finnel*, 964 F.2d 853 (8th Cir. 1992)). *Second*, as a matter of Eleventh Amendment principle, it makes no difference when immunity is asserted; a federal court has no jurisdiction to enter judgment against a nonconsenting State, and any judgment that it does enter is void. And *third*, as we note above (at note 3), the State in fact *did* assert its immunity prior the court of appeals' decision in *SDDS VIII*. To the extent that factor is relevant here, it was an affront to principles of state sovereignty for the court to issue a judgment against the State by blinding itself to that fact.

or privilege,'" and that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" like state sovereign immunity. *Id.* at 682 (citations omitted). Further, the Court observed that, in the context of federal sovereign immunity, "it is well established that waivers are not implied," and "[w]e see no reason why the rule should be different with respect to state sovereign immunity." *Ibid.* Against this background, it would be a bizarre twist if this Court struck down the notion of implied waiver or constructive consent in circumscribing Congress' powers under the Eleventh Amendment, yet reserved such notions for the federal courts, the very institutions whose power the Amendment expressly limits.

2. Given this Court's doctrine, it is not surprising that the Eighth Circuit's decision cannot be reconciled with the holdings of other courts of appeals, which have faithfully applied the principles expressed in *Atascadero*, *Pennhurst*, *Edelman*, and *Ford Motor*. Various courts of appeals have ruled that States did not waive their Eleventh Amendment immunity by, among many other things: failing to raise the immunity defense in an answer, *Richardson* v. *New York State Dep't of Correctional Serv.*, 180 F.3d 426, 448-449 (2d Cir. 1999); entering into a consent decree, *Saahir* v. *Estelle*, 47 F.3d 758 (5th Cir. 1995), and *Freimanis* v. *Sea-Land Serv., Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981) (Louisiana's action in entering into consent judgment did not waive Eleventh Amendment immunity because no attorney for Louisiana had authority to waive its immunity); appearing in a suit without explicitly raising Eleventh Amendment immunity, *Mascheroni* v. *Board of Regents*, 28 F.3d 1554 (10th Cir. 1994); appearing in a federal court action and offering substantive defenses, *Estate of Ritter* v. *University of Mich.*, 851 F.2d 846 (6th Cir. 1988); and raising the Eleventh Amendment defense in an answer, but failing to pursue it at trial, *Garcia* v. *Board of Educ.*, 777 F.2d

1403 (10th Cir. 1985). See also *Linkenhoker* v. *Weinberger*, 529 F.2d 51 (4th Cir. 1975) (even though Maryland attorney general represented to court that State waived its Eleventh Amendment immunity, Maryland law denied him the authority to effect such a waiver, so attempt to waive immunity was ineffective and court lacked jurisdiction).[8]

On the other hand, notwithstanding what we believe to be the clarity of this Court's statement of the controlling principles, several courts of appeals have adopted the approach taken by the Eighth Circuit in this case, holding that a State's participation in federal-court litigation *is* sufficient to effect a waiver of Eleventh Amendment immunity. Thus the Ninth Circuit, in *Hill* v. *Blind Industries & Services*, 179 F.3d 754 (1999), amended by 201 F.3d 1186 (9th Cir. 2000), held that a state agency "consented to jurisdiction in federal court by actively litigating th[e] action on the merits, while waiting until trial to first assert Eleventh Amendment immunity." 179 F.3d at 756. The court reasoned that, "[i]f a state or state agency elects to defend on the merits in federal court, it should be held to that choice the same as any other litigant." *Id.* at 758. In reaching this conclusion, the court of appeals dismissed this Court's contrary language in *Ford Motor* as simply "creat[ing] some confusion" on this point, and the analysis in *Edelman* as "dictum." *Id.* at 761. In this regard, the Ninth Circuit elected to follow what it characterized as the rule "propose[d]" by Justice Kennedy's concurrence in *Schacht* (*id.* at 758) – without

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[8] The Circuits are even divided about whether to raise the Eleventh Amendment *sua sponte*. Compare *Atlantic Healthcare Benefits Trust* v. *Googins*, 2 F.3d 1, 4 (2d Cir. 1993); *Sindia Expedition, Inc.* v. *Wrecked & Abandoned Vessel*, 895 F.2d 116, 119 (3d Cir. 1990); *Morris* v. *Washington Metro. Area Transit Auth.*, 702 F.2d 1037, 1040 (D.C. Cir. 1983); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 127 n.8 (5th Cir. 1980) with *Benning* v. *Board of Regents*, 928 F.2d 775, 777 n.2 (7th Cir. 1991).

acknowledging that Justice Kennedy, although expressing doubt about the propriety of the Court's current approach, also recognized the Court's repeated declaration that "a State which is sued in federal court does *not* waive the Eleventh Amendment simply by appearing and defending on the merits." *Schacht*, 524 U.S. at 393 (Kennedy, J., concurring). See also *Katz* v. *Regents of Univ. of Cal.*, 229 F.3d 831 (9th Cir. 2000) (Eleventh Amendment immunity waived when State failed to assert defense and defendant's counsel purported to waive immunity).

Other courts of appeals also have issued rulings that cannot be squared with the Eleventh Amendment principles enunciated by this Court. See, *e.g.*, *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, 210 F.3d 929 (10th Cir.) (immunity waived when State voluntarily engaged in pre-litigation arbitration), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000); *Genentech, Inc.* v. *Regents of Univ. of Cal.*, 143 F.3d 1446 (Fed. Cir. 1998) (Eleventh Amendment immunity waived when State voluntarily created controversy resolvable only in federal court), cert. granted, judgment vacated by 527 U.S. 1031 (1999). Review of the issue presented here is necessary to resolve this disagreement.

3. It should be added that the need for review is particularly acute here because the judgments that are the subject of the State's Rule 60(b)(4) motion in fact involved especially egregious violations of the Eleventh Amendment – and because the decision below is the latest in a series of Eighth Circuit rulings in this litigation that demonstrate a cavalier disregard for the Amendment's dictates. Although the question whether the court below had jurisdiction to entertain respondent's actions against the State in the first instance was not expressly decided by the Eighth Circuit in its most recent decision, it bears emphasis that the Eleventh Amendment quite plainly made that exercise of jurisdiction improper. This means

that, absent the court of appeals' erroneous finding of waiver, the State would be entitled to relief in this proceeding.

a. At the outset, the actions in both *SDDS VI* and *SDDS VIII* unquestionably were barred by the Eleventh Amendment insofar as they proceeded against the State of South Dakota *itself*. The Eighth Circuit apparently believed that the State could be subjected to suit in its own name because SDDS was seeking "prospective injunctive relief." *SDDS VIII*, 97 F.3d at 1035 (App., *infra*, 16a). But that conclusion was plainly wrong. The Court has held repeatedly that, "when the State itself is named as the defendant, a suit * * * is barred [by the Eleventh Amendment] regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 101-102. There is no ambiguity regarding the scope of the immunity provided to States, *qua* States, by the Amendment: the Court has "often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 58 (1996) (citing *Cory* v. *White*, 457 U.S. 85, 90 (1982)) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought."). "The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out a State's treasury,' * * *; it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" 517 U.S. at 58 (citing *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), and *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

Indeed, the theory of *Ex parte Young*, 209 U.S. 123 (1908) – upon which the Eighth Circuit purported to rely – is that "a suit challenging the constitutionality of a state official's action * * * is *not* one against the State." *Green*, 474 U.S. at 68

(emphasis added). That decision accordingly cannot justify *naming* the State as a defendant in federal court. The Eighth Circuit thus surely erred in holding that *Ex parte Young* authorized its assertion of jurisdiction over South Dakota.[9]

b. The Eighth Circuit also was manifestly wrong when it found that the Eleventh Amendment did not deny it jurisdiction to decide the *SDDS VIII* suit insofar as it was directed against state officials. Under *Ex parte Young*, of course, state officials may be enjoined not to violate federal law. See 209 U.S. at 155-156. But the *Ex parte Young* doctrine by its terms applies only "where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." *Coeur d'Alene Tribe*, 521 U.S. at 294 (opinion of O'Connor, J.) (emphasis in original). Indeed, the Court made clear in *Ex parte Young* itself that federal jurisdiction does *not* attach when the plaintiff is "merely making [a state official] a party as a representative of the State, and thereby attempting to make the state a party." 209 U.S. at 157. In particular, the Eleventh Amendment precludes suits that are nominally directed at state officials when the relief sought "is tantamount to an award of damages for a past violation of

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[9] In issuing the injunction against the "state defendants" – which included the State of South Dakota, as is obvious from the caption of *SDDS VI* – the Eighth Circuit may have assumed that inclusion of the State in its order was immaterial because its ruling also was directed against individual state officials. But as this Court expressly held in *Pugh*, 438 U.S. 781, that assumption is incorrect because the State "has an interest in being dismissed * * * to eliminate the danger of being held in contempt it if should fail to comply with the mandatory injunction." *Id.* at 782. Indeed, the Court granted certiorari in *Pugh* for the sole purpose of dismissing the case against the State of Alabama and its Board of Corrections, based on their Eleventh Amendment immunity. *Ibid.* See also *Treasure Salvors*, 458 U.S. at 686-88; *Tindal* v. *Wesley*, 167 U.S. 204, 223 (1897).

federal law, even though styled as something else." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986) (footnote omitted). See *Green*, 474 U.S. at 68; *Edelman*, 415 U.S. at 666.

Indeed, *Green* v. *Mansour* applied that principle to reject a claim that was virtually identical in principle to the one in *SDDS VIII*. In *Green*, the plaintiff brought an action in federal court seeking "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." 474 U.S. at 67. This Court held the suit barred by the Eleventh Amendment, explaining that

> the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. *But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.* * * * [A] declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman* v. *Jordan* * * *.

Id. at 73 (emphasis added).

That conclusion should have disposed of the *SDDS VIII* litigation in the Eighth Circuit. While the federal court may have had jurisdiction to hear a suit challenging *prospective* application of the ballot referendum in *SDDS VI* (although the court did not, of course, have jurisdiction to treat the *State itself* as a party in that proceeding), by the time the *SDDS VIII* action was filed, "there [was] no continuing violation of federal law to enjoin." *Green*, 474 U.S. at 64. After the Eighth Circuit held the ballot referendum unconstitutional in 1995, neither the State

nor any state officers made any attempt to enforce it; the state-court suit that *SDDS VIII* enjoined sought *past* damages for a temporary taking that already had expired.[10] Against this background, the express (and only) goal of the *SDDS VIII* litigation was to dictate the outcome of respondent's state-court suit against the State, which seeks *retroactive* monetary compensation. As in *Green*, the relief sought by respondent in *SDDS VIII* thus had "much the same effect as a full-fledged award of damages or restitution by the federal court." 474 U.S. at 73. Indeed, the jurisdictional defect was much clearer in *SDDS VIII* than it was in *Green*. There, the Court's concern was that a declaratory judgment might have res judicata effects in hypothetical future litigation against the State; in *SDDS VIII*, the federal court enjoined the State not to contest liability in a *pending* damages action in state court. The State of South Dakota is entitled to pursue its argument that this judgment should be vacated as void.

B. The Eighth Circuit's Holding That A Party May Not Seek To Vacate A Void Judgment Under Rule 60(b)(4) Without First Having Appealed And Sought Certiorari Exacerbates A Conflict In The Circuits And Departs From Decisions Of This Court

The second half of the Eighth Circuit's holding – that relief under Rule 60(b)(4) is unavailable because the State failed to seek certiorari to obtain review of the challenged judgments in *SDDS VI* and *SDDS VIII* – also warrants this Court's attention. The analysis used below exacerbates a long-standing conflict in the courts of appeals about the applicability of Rule 60(b)(4) in these circumstances, and cannot be squared with a dispositive holding of this Court. Because the error below

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[10] The Eighth Circuit issued its opinion in *SDDS VIII* in October 1996, more than 18 months after the period of the temporary taking ceased. See *SDDS* v. *State*, 569 N.W.2d at 292.

regarding Rule 60(b)(4) compounds and is closely related to the Eighth Circuit's misunderstanding of the Eleventh Amendment, further consideration of the issue by this Court is in order.

1. At the outset, the decision below on Rule 60(b)(4) contributes to a deeply rooted split in the circuits. The Eighth Circuit's decision that the rule cannot be used to "attack a final court of appeals' ruling in lieu of a proper petition for review in the United States Supreme Court" (App., *infra*, 4a) squarely conflicts with the decision of the Sixth Circuit in *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974). In *Jordan*, the district court ruled against a State, awarding attorneys' fees and expenses. *Id.* at 703-704. No appeal was taken from the order awarding fees, and when the judgment remained unpaid after eight months, the plaintiffs received a writ requiring a bank holding state funds to turn over the amount of the judgment. *Id.* at 704. The State then filed a Rule 60(b) motion, arguing that the judgment against the State should be vacated as void on Eleventh Amendment grounds. *Ibid.*

The Sixth Circuit held that the motion should have been granted, even though the State had failed to object to the award "until after the judgment was entered and execution proceedings undertaken," and even though the State had failed to appeal the judgment. 500 F.2d at 710. The court explained that "a void judgment is no judgment at all and is without legal effect," and that "[a] party cannot be precluded from raising the issue of voidness in a direct or collateral attack because of the failure to object prior to, or at the time of, entry of the judgment." *Ibid.* The court therefore held that, "once it is determined that a state is not subject to federal jurisdiction because of the operation of the Eleventh Amendment, a court must vacate any judgment entered in excess of its jurisdiction." *Ibid.* That decision conflicts squarely with the holding below.

The Eighth Circuit's decision also cannot be reconciled with the holdings of other courts of appeals that have followed the Sixth Circuit's approach. In *Watts* v. *Pinckney*, 752 F.2d 406 (9th Cir. 1985), the Ninth Circuit affirmed the grant of a Rule 60(b)(4) motion to a movant who had "not appeal[ed] the judgment against him." *Id.* at 407. Relying on *Jordan*, the court held that, because "the judgment against [the movant] was void," he "was entitled to restitution under [Rule] 60(b)(4)." *Id.* at 410. The court explained: "The district court was compelled to exercise its authority under Rule 60(b)(4) to vacate the judgment against [the movant]. 'A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside.'" *Ibid.* (quoting *Jordan*, 500 F.2d at 704).

Similarly, in *Carter* v. *Fenner*, 136 F.3d 1000 (5th Cir. 1998), the Fifth Circuit expressly rejected the argument that Rule 60(b)(4) relief is unavailable when the movant had failed to appeal the challenged judgment: "While [the movant] did not file a notice of appeal * * * its motion pursuant to Rule 60(b) was timely." *Id.* at 1006. The court reasoned that, although failure to appeal may militate against the grant of relief under Rule 60(b)(6), "[m]otions brought pursuant to Rule 60(b)(4) * * * constitute such exceptional circumstances as to relieve litigants from the normal standards of timeliness associated with the rule." *Ibid.* Again, the Eighth Circuit's decision cannot be reconciled with these holdings.

On the other hand, the Eighth Circuit's approach was endorsed by the Third Circuit in *Vecchione* v. *Wohlgemuth*, 558 F.2d 150 (3d Cir. 1977). There, the court held that Rule 60(b)(4) could *not* be used to vacate a judgment against state defendants that the State had failed to appeal. The Third Circuit reasoned that "[i]f, as the cases indicate, eleventh amendment immunity from suit in a federal court may be waived, that waiver must be deemed to have become final at the

latest when the resulting judgment has become final." *Id.* at 159. Because in *Vecchione* the Eleventh Amendment challenge to the judgment "was not made until almost a year after the time for appeal from the [challenged] order had expired," the court held Rule 60(b)(4) relief unavailable. *Ibid.* In reaching this conclusion, the Third Circuit expressly "disagree[d] with the holding in *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) that a claim of sovereign immunity can be raised by a Rule 60(b)(4) motion at any time." 558 F.2d at 159 n.7. We note, however, that the Eighth Circuit in this case went beyond even the holding of *Vecchione*: although the Third Circuit held that Rule 60(b)(4) relief is unavailable if the movant failed to *appeal* the challenged judgment, the court below also held such relief unavailable if the movant failed to seek *discretionary review in this Court*.

This conflict involves a recurring issue that may arise in a range of settings and – as this case demonstrates – bears on matters of considerable importance to the States' sovereign interests. It should be resolved by this Court.

2. That is particularly so because the decision below on Rule 60(b)(4) is wrong, for several reasons. *First*, the Eighth Circuit appeared to believe that an appeal is necessary before a party seeks Rule 60(b)(4) relief because the Rule 60(b)(4) motion otherwise would substitute a "collateral[] attack" on the challenged judgment for direct appeal. App., *infra*, 4a. This analysis, however, turns on a plain misunderstanding of the Rule 60(b)(4) mechanism. A Rule 60(b)(4) "attack on [a] judgment [i]s *direct, not collateral*," and "[t]he doctrine of res judicata does not apply to direct attacks on judgments." *Watts*, 752 F.2d at 410 (emphasis added). See *In re Gledhill*, 76 F.3d 1070, 1082 (10th Cir. 1996) ("'It is elementary, of course, that res judicata does not preclude a litigant from making a direct attack upon the judgment before the court that renders it.'") (citation omitted); *Jordan*, 500 F.2d at 710. At the same time,

it is black letter law that, "if a court determines that a judgment is truly void, * * * the court really has no discretion at all; it must recognize that the judgment is a nullity and grant relief." 12 Daniel R. Coquillette et al., MOORE'S FEDERAL PRACTICE § 60.44[5][a], at 60.150 (Matthew Bender ed. 1999). Against this background, there is nothing in Rule 60(b)(4) – or in any other source of law – that precludes the grant of relief simply because the movant failed to appeal (or seek certiorari from) the challenged judgment.

Second, even if a prior appeal somehow were thought to be a prerequisite for Rule 60(b)(4) relief in other circumstances, that requirement would not apply in cases like this one, where the challenged judgment was void because inconsistent with sovereign immunity principles. Indeed, this Court has held that the sovereign may make even a *true* collateral attack on such a judgment. In *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), a court in Missouri ruled against the United States, notwithstanding the United States' failure to waive its sovereign immunity. The United States did not seek review of that decision on appeal. The plaintiff then asserted that the Missouri judgment should be given res judicata effect in a second suit in Oklahoma. 309 U.S. at 509-511. After noting that the Missouri judgment was "void" because the sovereign immunity of the United States may be waived only by statute and not by government officials (*id.* at 512-513) – the rule that also applies to waivers of state immunity under the Eleventh Amendment – the Court held:

> *[t]he reasons for the conclusion that this immunity may not be waived [through the participation of government officials in litigation against the sovereign] govern likewise the question of res judicata.* * * * Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to

> this exercise of judicial power. Public policy forbids the suit unless consent is given.

Id. at 514 (emphasis added). The Court therefore held that the United States was not bound by the initial, void judgment. *Id.* at 514-515. That conclusion necessarily applies *a fortiori* in this case, where the sovereign is launching a direct, rather than a collateral, attack on the void judgment.

Third, the Eighth Circuit's holding simply has no conceivably plausible basis when it requires a party seeking Rule 60(b)(4) relief to have sought not only appellate relief from the challenged judgment, but also *certiorari review in this Court*. There are many reasons why a party might not seek review in this Court of an adverse appellate judgment, not the least of them the recognition that most appellate judgments do not present certworthy issues and that most certiorari petitions are (deservedly) denied. Punishing a litigant that failed to file a certiorari petition by subsequently precluding review of its Rule 60(b)(4) motion therefore is fundamentally inequitable and finds no support in the policy of the rule. Such an approach also will force many litigants to file insubstantial petitions in this Court solely to protect their right to pursue a Rule 60(b)(4) remedy in the future should the need and opportunity to do so arise. Needless to say, a holding with such implications is insupportable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL J. SCHAFFER
SANDRA K. HOGLAND
Davenport, Evans, Hurwitz & Smith, LLP
513 South Main Avenue
Sioux Falls, SD 57101
(605) 336-2880

CHARLES A. ROTHFELD
Counsel of Record
DAVID GOSSETT
Mayer, Brown & Platt
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM P. FULLER
Woods, Fuller, Shultz & Smith, P.C.
300 S. Philips Ave., Ste. 300
P.O. Box 5027
Sioux Falls, SD 57101
(605) 336-3890

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